United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1548

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IN THE MATTER
of
The Application of AAACON AUTO TRANSPORT, INC.,
Petitioner,

For the issuance of a Writ of Mandamus to

Hon. MORRIS E. LASKER, United States District Judge for the Southern District of New York

PETITION FOR RECONSIDERATION AND SUGGESTION THAT RECONSIDERATION BE IN BANC

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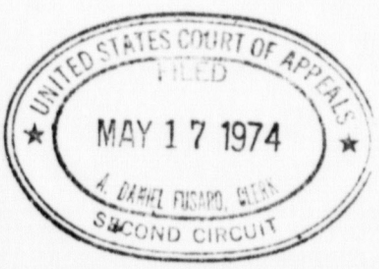

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UNITED STATES COURT OF APPEALS

Second Circuit

In the Matter of The Application of AAACON AUTO TRANSPORT, INC., Petitioner, for the issuance of a writ of mandamus to Hon. MORRIS E. LASKER, United States District Judge for the Southern District of New York	Docket No. 74-1548 PETITION FOR RECONSIDERATION AND SUGGESTION THAT RECONSIDERATION BE IN BANC

Petitioner Aaacon Auto Transport, Inc. petitions for a reconsideration of the judgment entered in this matter on May 3, 1974 denying petitioner's application for a writ of mandamus, and respectfully suggests that a reconsideration in banc is appropriate. For the convenience of the Court, copies of the original petition and Brief accompany this petition.

I - GROUNDS

This petition is based on the following grounds:

1. In the opinion of petitioner, the Court has

overlooked the fact that petitioner will never have a right of appeal from the referral procedure adopted by Judge Lasker in his decision below because it will be rendered moot after the referral has occurred.

2. In the opinion of petitioner, the Court has overlooked the fact that Judge Lasker's decision has deprived petitioner of a right to a summary trial under Title 9 U.S. Code Section 4 in violation of due process of law.

3. In the opinion of petitioner, the Court has overlooked the fact that Judge Lasker's decision is contrary to law and has invoked a procedure expressly prohibited by Congress under Title 9 U.S. Code Section 4 in violation of due process of law.

4. In the opinion of petitioner, the Court has overlooked the fact that Judge Lasker's decision and this Court's denial of petitioner's application for a writ of mandamus, appear to be in substantial conflict with this Court's decision in Aaacon Auto Transport, Inc. v. Levine, 456 F2d 1335 (2nd Cir. 1971) and Aaacon Auto Transport, Inc. v. Ninfo, 490 F2d 83 (2nd Cir., 1974), which implicitly rejected the doctrine of primary jurisdiction.

II - ARGUMENT

Petitioner believes these points are substantial for the following reasons:

1. This petition for reconsideration does not concern itself with the validity or enforceability of Aaacon's arbitration provision. It deals only with Judge Lasker's reliance on the doctrine of primary jurisdiction to stay Aaacon's petition to compel arbitration pending a referral of that issue to the Interstate Commerce Commission.

Aaacon contends that Judge Lasker's referral of the issue of the validity of Aaacon's arbitration provision to the Interstate Commerce Commission is a decision that can never be appealed. All Orders of the Court below were interlocutory and cannot be appealed, and appeal at any time subsequent to the referral becomes a moot issue. If Judge Lasker ultimately decides the matter before him, Aaacon might appeal an adverse decision regarding its arbitration provision. However, it can never appeal his invocation of the doctrine of primary jurisdiction and his referral of the issue to the agency because once the matter has been referred it cannot be unreferred upon appeal. The only review possible is by writ of mandamus.

This Court, in Aaacon Auto Transport, Inc. v. Ninfo,

490 F2d 83 (2nd Cir. 1974), after finding that the doctrine of forum non conveniens did not apply to 9 U.S. Code Section 4, specifically stated that "an order staying arbitration pending a trial on the validity of the agreement to arbitrate is also a non-appealable interlocutory order," and "the proper procedure for Aaacon, therefore, was to seek mandamus."

Certainly, a court of first resort cannot be the court of last resort on a question regarding substantial rights granted under a Federal statute. And clearly, there is no way to question Judge Lasker's decision on the issue of primary jurisdiction, at any time, unless it be done now through this writ of mandamus. It is not merely that Aaacon's right to appeal on this issue could be inadequate, rather it is that the right of appeal is totally nonexistent.

2. An important substantial right of petitioner is being denied without due process of law. The right under 9 U.S. Code Section 4 to a speedy trial on the issue of the validity of an arbitration provision is a very substantial right granted under the Federal Arbitration Act. Robert Lawrence Co. v. Devonshire Fabrics Inc., 271 F2d 202 (2nd Cir. 1959; Aaacon Auto Transport, Inc. v. Ninfo, 490 F2d 83 (2nd Cir. 1974), cited in petitioner's Brief. The language of 9

U.S. Code Section 4 is very explicit in directing that "the court shall proceed summarily to a trial" of the issues concerning the making of an arbitration agreement. This right of petitioner has been completely obliterated by Judge Lasker's refusal to decide and his preliminary referral to the agency with its attendant delay and suspension of judicial determination. Further, the absence of any appeal from this ruling constitutes a denial of due process because the Congressional mandate of a speedy trial, once violated, cannot be resuscitated.

This issue is of extreme importance because the doctrine of primary jurisdiction, if invoked, will always conflict with the Congressional mandate in Section 4 of 9 U.S. Code, as well as many other statutes requiring a trial of a summary nature. This Court, in permitting the application of this doctrine in such instances, threatens the rights of all litigants to speedy trials where required by statute.

3. Another reason why a referral to the administrative agency is an improper procedure in this case and constitutes a denial of due process, is that 9 U.S. Code Setion 4 provides for a jury trial on the issue of the making of an arbitration agreement. The statute clearly states that in those cases where a jury has been demanded that the jury

shall decide the validity of an arbitration provision. Clearly, it would violate due process of law to deny a jury trial of the issue where permitted by statute and replace it, sua sponte, with an administrative referral.

Likewise, if a jury trial has not been demanded, it does not lessen the obligation of the court, sitting without jury, to hold a trial of this issue. 9 U.S. Code Section 4 states: "If no jury trial be demanded...the court shall hear and determine such issue." This language, taken in conjunction with the other language of this section stating: "If the making of an arbitration agreement...be in issue, the court shall proceed summarily to a trial thereof", shows clearly that an immediate trial shall be had, with or without jury, and that a referral to an agency is improper in either case.

4. Judge Lasker's decision invoking the doctrine of primary jurisdiction seems to be in conflict with this Court's decisions in Aaacon Auto Transport, Inc. v. Levine, 456 F2d 1335 (2nd Cir. 1971) and Aaacon Auto Transport, Inc. v. Ninfo, 490 F2d 83 (2nd Cir. 1974) cited in petitioner's Brief, which implicitly reject the application of the doctrine of primary jurisdiction. Further, the denial of petitioner's application for a writ of mandamus leaves unresolved this apparent discrepancy, and leaves the decisions of this Court in conflict.

In the Levine case, this Court considered an almost

identical arbitration provision and decided the issue of its validity. The doctrine of primary jurisdiction is always before the Court, and the Court by deciding issue on its merits by implication held that the doctrine of primary jurisdiction did not apply. See Louisiana & Arkansas Ry. Co. v. Export Drum Co., 359 F2d 311 (5th Cir. 1966) cited in petitioner's Brief.

Similarly, in the Ninfo case, this Court held that it was for the District Court to determine the issue of the validity of the arbitration provision. This Court, in finding that the doctrine of forum non conveniens did not apply to 9 U.S. Code Section 4, stated: "...the statute mandates that the Court below proceed summarily to a trial of the issues as to the making of the agreement."

The holding of these cases, i.e., that the District Courts can and should decide the issue of the validity of the arbitration provision, has now been questioned by Judge Lasker's decision and the decisions in this Circuit will no longer be uniform if this referral to an agency is left standing. Judge Lasker's decision now leaves it unclear whether the District Courts must decide the issue of the validity of an arbitration provision under 9 U.S. Code Section 4 or whether they must refer such issue preliminarily to an agency. Judge Lasker's decision not only conflicts with the decisions of this Court, as shown above, it also opens a Pandora's box regarding the application of the procedures mandated by Congress in

9 U.S. Code Section 4 to any arbitration provision between any parties in any contract involving interstate commerce.

Congress alone has the power to prescribe the rules of procedure in the District Courts. Livingston v. Storey, 34 U.S. 632 (1835); Locherty v. Phillips, 319 U.S. 182 (1942). They have done so in the Federal Arbitration Act. In fact the Federal Rules of Civil Procedure are superseded by the procedures set forth in 9 U.S. Code Section 4. Federal Rules of Civil Procedure 81(a)(3): "In proceedings under Title 9, U.S.C., relating to arbitration,...these rules apply only to the extent that matters of procedure are not provided for in those statutes."

Moreover, submission of this case to an administrative tribunal may result in a decision which conflicts with prior court interpretations. It is the prior court decisions which must prevail. Cory Corp. v. Sauber, 266 F2d 58 (CA Ill 1959) rev'd other grounds 363 U.S. 709.

III - SUGGESTION FOR RECONSIDERATION IN BANC

Petitioner respectfully suggests that a reconsideration of this matter in banc is appropriate for the following reasons:

1. Judge Lasker's decision invoking the doctrine of primary jurisdiction and the Court's denial of petitioner's application for a writ of mandamus seem to be in conflict with earlier decisions by this Court implicitly rejecting

the application of the doctrine of primary jurisdiction, and consideration by the full Court is necessary to secure and maintain uniformity of its decisions.

2. Two questions of exceptional importance have been presented to the Court for consideration: (a) Does the invocation of the doctrine of primary jurisdiction deny petitioner a statutory right to a summary trial under 9 U.S. Code Section 4 in violation of due process and (b) does the referral of the issue of the validity of an arbitration provision to an agency violate a Congressional mandate to the courts to decide the issue forthwith, with or without a jury?

IV - REQUEST FOR AN OPINION

Petitioner respectfully requests that an opinion issue from the Court on its application for a writ of mandamus so that petitioner may understand the findings of the Court. Petitioner cannot otherwise ascertain if its papers were defective; if the Court has held that primary jurisdiction prevails over the mandate for a summary trial as provided in the Federal Arbitration Act; whether a District Court is permitted to make a preliminary referral to an agency under the Federal Arbitration Act when the statute provides for a trial on the issue, with or without a jury; whether petitioner has been deprived of a substantial statutory right without due process of law; and whether the decision of the Court below conflicts with prior decisions of this Court.

WHEREFORE, petitioner respectfully requests that this Court grant a reconsideration in banc of the Court's Order denying petitioner's application for a writ of mandamus, and that the Court issue an opinion of its findings.

Dated: New York, New York
May 16, 1974

Respectfully submitted,

Richard S. Kaplan

Richard S. Kaplan,
A Member of the Bar of This Court
and of this firm

ZOLA and ZOLA
Attorneys for Petitioner Aaacon
Auto Transport, Inc.
228 West 41st Street
New York, New York 10036
Tel.: (212) 354-1444

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PAUL A. ZOLA, being duly sworn, deposes and says:

I am Executive Vice President of Aaacon Auto Transport, Inc., the petitioner in the above-entitled action. I have read the foregoing petition, and know the contents thereof, and the same is true to my own knowledge.

Paul A. Zola

Sworn to before me this
16th day of May, 1974

Richard S. Kaplan

RICHARD S. KAPLAN
NOTARY PUBLIC, STATE OF NEW YORK
No. 7160500
Qualified in New York County
Term Expires March 30, 1976

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BELLA EISENSTEIN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1814 - 78th Street, Brooklyn, New York.

That on the 17th day of May, 1974 deponent served the within Petition for Reconsideration upon Hon. Morris E. Lasker, respondent in this action at the U. S. Courthouse, Foley Square, New York, New York, the address designated for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, -- a post office -- official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this
17th day of May 1974

Bella Eisenstein

ALBERT S. LEFKOWITZ
Notary Public, State of New York
No. 41-4509124
Qualified in Queens County
Commission Expires March 30, 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BELLA EISENSTEIN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1814 - 78th Street, Brooklyn, New York.

That on the 17th day of May, 1974 deponent served the within Petition for Reconsideration upon LaGinestra and Donnelley, Esqs., attorneys for respondents below in this action, at 10 Platt Street, New York, New York, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper, in -- a post office -- official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me this
17th day of May, 1974.

Bella Eisenstein

ALBERT S. LEFKOWITZ
Notary Public, State of New York
No. 41-4509124
Qualified in Queens County
Commission Expires March 30, 1975